

STATE OF NORTH DAKOTA
BOARD OF NURSING

IN THE MATTER OF:)
_____))
Board of Nursing of the State of)
North Dakota,)
)
Plaintiff,)
)
v.)
)
Bonnie Kraft, R.N.,)
)
Respondent.)

**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

.....

On November 5, 1999, a Complaint was filed with the Board of Nursing of the state of North Dakota ("Board") by Constance B. Kalanek, R.N., PH.D. ("Dr. Kalanek"), executive director of the Board, requesting administrative action against the registered nurse license of Bonnie Kraft. Kraft is a registered nurse ("RN") in the state of North Dakota licensed by the Board, license registration #R23493. The Complaint cites as grounds for administrative action N.D.C.C. § 43-12.1-14(1), (3), (5) and N.D. Admin. Code § 54-02-07-01.1(5), (6). The Complaint alleges violations of the above cited laws in that Kraft was observed at work to be under the influence of a chemical substance (para. 3a), refused a proper request by her employer that she submit to a chemical and medical screening and evaluation ("tests") (para. 3b), was suspended from her employment as a result of her refusal to consent to tests (para. 4), had a TRO issued against her by a district court for disorderly conduct (para. 5), was convicted on April 6, 1998, of the crime of simple assault (para. 6), and engaged in threatening, insulting, and verbally abusive conduct to a 16-year old son of a Minot, North Dakota physician (para. 7).

On November 26, 1999, Bonnie Kraft filed her Answer (with attachments) in response to the Board's Complaint.

On November 1, 1999, the Board requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the Complaint. On November 8, 1999, ALJ Allen C. Hoberg was designated.

On November 19, 1999, the ALJ issued a Notice of Hearing. The notice scheduled a December 17, 1999, hearing. The hearing was held as scheduled beginning at 9:00 a.m., at the Office of Administrative Hearings, Bismarck, North Dakota. The Board was represented by Special Assistant Attorney General Calvin N. Rolfson. Mr. Rolfson presented the Board's case by calling 10 witnesses and offering 21 exhibits. Exhibits 1-21 were offered by Mr. Rolfson. Upon objection, Exhibit 15 was not admitted. Upon objection, part of Exhibit 12 was not admitted. (The part now marked Exhibit 12 was admitted, other pages were not.) Exhibits 18-20 were admitted for limited purposes (there were also objections to these three exhibits). (These three exhibits were admitted only for the purpose of showing that a doctor filed these three reports regarding Kraft in accordance with hospital policy.) The remainder of the offered exhibits were admitted, some over objection (there were also objections to Exhibits 13, 14, and 21). Bonnie Kraft was present at the hearing. She was represented at the hearing by attorney Michael R. Hoffman, Mandan. Mr. Hoffman offered two exhibits (Exhibits 22 and 23) both of which were admitted. Mr. Hoffman cross-examined the Board's witnesses. After the Board's presentation, Mr. Hoffman at first called no witnesses. However, when Mr. Hoffman did not call Bonnie Kraft as a witness, Mr. Rolfson called her as a hostile witness, as part of his case. Then, following Kraft's testimony, Hoffman called Kraft's daughter Amanda ("Mandy") Kraft as a witness.

The ALJ takes official notice of the September 5, 1996, final Order of the North Dakota State Board of Medical Examiners. *See* FOF # 22, below.

At the close of the hearing the ALJ asked the parties to file briefs. Mr. Rolfson filed his brief on January 10, 2000. Mr. Hoffman filed his brief on January 21, 2000. Mr. Rolfson filed his reply brief on January 31, 2000.

Based on the evidence presented at the hearing and the briefs of the parties, the administrative law judge makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. Bonnie Kraft is currently a RN practicing in North Dakota, licensed by the Board as a RN, license registration #R23493.

2. Recently, Kraft has been practicing as a RN, employed by Trinity Medical Center, Minot (“Trinity”). She is also currently employed as a RN at the Benedictine Living Center in Minot. *See* Exhibit 23. *See* also, Exhibit 22.

3. While employed as a RN at Trinity on January 22, 1999, Kraft was observed at work (actually on that day Kraft was working as a float nurse at Trinity’s Centennial Convenient Care Center in Minot – hereinafter “Centennial”) to be under the influence of a chemical substance with various behaviors noted, by various people (two doctors and three nurses), observed at various times over a relatively long period of time. *See* documentation regarding incident and behaviors observed, Exhibits 2-8. At Centennial, two doctors and a nurse smelled fruity breath or an alcoholic odor on Kraft that was thought to be either acetone or alcohol. *See* Exhibits 2, 3, and 4. Again, not all the people noticing Kraft’s behavior noticed the same thing, or noticed at the same time. *See* Exhibits 2-8.

4. A Centennial doctor directed Kraft to go to the Trinity emergency room (the “ER”) to determine what was the cause of the odor. Kraft was directed to be taken by security officers to the ER for tests.

5. Kraft was transported to the ER by security guards where she refused to be tested. At the ER, a supervisory nurse explained to Kraft that Kraft needed to take blood and urine tests to rule out any alcohol or drugs in her system at that time. Kraft was told by that same nurse that if she refused to be tested that Trinity management, according to hospital policy, would suspend her from work. The supervisory nurse stated the request and advice twice to Kraft. There was another nurse present with the supervisory nurse, as a witness, when she talked to Kraft. Just before and during this contact with nursing staff at the ER, Kraft was agitated and apparently calling (talking to) an attorney. Yet, she refused to be tested. The two nurses left temporarily. Shortly, one returned to where Kraft had been seated. But, Kraft had left the ER, and she did not come back. While Kraft was at the ER, the two nurses noted behaviors regarding Kraft. Exhibits 5, 6, 7, and 8. However, both nurses said that they did not get close enough to smell any odors on Kraft.

6. Trinity suspended Kraft from practicing at Trinity for failure to take the required tests. Exhibit 10, Discipline Documentation. The “Discipline Documentation” puts it in terms of the suspension resulting from “events which occurred at the Convenient Care Clinic Friday, January 22nd.” Kraft said in the document “I am aware that my actions were the cause for my suspension.” Kraft signed the document after her suspension had been lifted. *Id.* (“I understand that the suspension has now been lifted.”) Kraft’s suspension was stated as being pursuant to Trinity policies. *Id.* See Exhibits 16 and 17, Trinity’s Personnel Policies & Procedures Department Managers Guide, and its Employee Handbook “Substance Abuse – Rehabilitation” policies, respectively, discussed further in FOF #s 11 and 12 below. According to Trinity policies, “[r]efusal to submit to a drug/alcohol test shall be considered to be a positive test.” Exhibit 17, at 26. Employee refusal to submit to such a test is considered insubordination and may result in termination. Exhibit 16, at 2; see Exhibit 17, at 28.¹

7. Upon employment, Kraft likely received a copy of the TMC employee handbook or, at least, was made aware of it. Kraft knew about or should have known about Trinity’s policies regarding testing for drugs and alcohol and the results of failure or refusal to test.

¹ Trinity’s policies on drug/alcohol testing are stringent. Use or possession of drugs and/or alcohol is prohibited and will result in immediate discipline. Exhibit 16, at 1. The rules regarding substance abuse are severe and specifically stated. They are to be “enforced uniformly with respect to all employees.” Exhibit 17, at 25.

8. Mr. Paul Simonson, Trinity's personnel director, testified that Trinity did not consider the January 22, 1999, incident involving Kraft to be a minor incident, because it involved someone possibly under the influence of drugs or alcohol and it involved a suspension. He said that the incident was not handled as a minor incident by Trinity. Dr. Allen, a doctor at Centennial on January 22, 1999, did not consider the incident to be a minor incident. If Kraft were intoxicated, he said, "she was a clear and present danger to [Centennial] patients."

9. A fair reading of the testimony and review of the exhibits indicates that while Kraft was at Centennial, she was not given any real opportunity to explain her situation. After some observations were made by the two doctors and a nurse, and some calls made by the doctors, Kraft was presented with a *fate accompli*, she was basically told by a doctor that she would have to be tested and she was sent directly to the ER for testing. Kraft did not assert an explanation or insist on being given an opportunity to explain. However, at the ER, Kraft did have an opportunity to explain her situation to a supervisory nurse but did not. Although, at that point in time Kraft's options were limited because she had already been told by a doctor before she was transported to Trinity that she would be tested and, at the ER, she was told by a supervisory nurse, further, that she would be tested or she would be suspended.

10. Kraft denies drinking alcohol on January 22, 1999. She testified that she tried several times to get off work on January 22 because she was ill. She said that she has asthma and took inhalers and cough syrup on January 22. Kraft said that she refused the chemical testing on January 22 because she believed that she was not given an opportunity to explain herself before she was ordered to take the tests. Kraft admitted that she did not assert an explanation either at Centennial or at the ER because "I was in shock" from being ordered to be tested. Kraft testimony. Kraft said she believes that it was all "concluded already" or "all prearranged" without her input. *Id.* Kraft said that she refused to take the tests at the ER upon the advice of legal counsel, whom she said she apprised of the situation.

11. Exhibits 7 and 20 are copies of Trinity's "Drug and Alcohol Policy Investigative Guidelines." No one asked Kraft the questions on the guidelines, though Trinity policy requires that that form be used and those questions asked. *See* Exhibit 16, at 2 (Procedure). Kraft's supervisor is

required to complete the forms “Observable Behavior” and “Investigative Guidelines.” *Id.*, see attachments to Exhibit 16. Yet, no Trinity supervisor completed the investigative guidelines form for this incident in regard to Kraft. If this form had been completed before Kraft was ordered to undergo tests, Kraft would have been given the appropriate opportunity to explain to her supervisor or to a supervisor. The questions found in the investigative guidelines are supposed to be asked as part of the initial investigation, before the employee is asked to undergo tests. *Id.* The supervisory nurse who interviewed Kraft at the emergency room and advised her to take the tests, advising her also about the results of failure to take the tests, used the investigative guidelines form to record part of her statement about the incident, but did not use it for asking Kraft questions on the form. Exhibit 7. Dr. Schlecht also used the investigative guidelines form at Centennial to record part of her statement regarding the Kraft incident (Exhibit 20) but, apparently, no one at Centennial used the investigative guidelines in asking questions of Kraft.

12. A close review of Trinity’s Personnel Policies & Procedures Department Managers Guide (Exhibit 16) and its Employee Handbook “Substance Abuse – Rehabilitation” Policies (Exhibit 17 – excerpts from the handbook, pp. 22-29) indicates that Trinity did not follow its own procedures in trying to test Kraft at a reasonable cause level.² Among the irregularities in testing are that a supervisor did not complete the required forms (Exhibit 16, at 2), the employee (Kraft) did not meet with the Personnel/EPA representative for further evaluation (*id.*), the appropriate vice president was not appropriately involved (Exhibit 16, at 3), the personnel director or his alternate (the director of the Employee Assistance Program) was not appropriately involved and did not schedule the tests (Exhibit 17, at 27).³

13. Although Kraft did confer with the Trinity Director of Practice Management, Carol Schwan, it was apparently not until later, on January 25, 1999. Ms. Schwan testified that she was Kraft’s manager in a clinic scenario. Schwan says that she was called by someone from the hospital

² There are two levels of drug testing implemented at Trinity (random testing is not performed), post-accident testing and reasonable cause testing. Kraft’s situation involves the later. Exhibit 17, at 27.

³ Both Exhibit 16 and 17 contain procedures for drug/alcohol testing. Exhibit 16 at 2-5; Exhibit 17 at 27-29. The two documents do not always seem to be consistent. However, the procedures appear to be mandatory. Exhibit 16, at 2.

about the incident, apparently after January 22, and then she tried to call Kraft. Schwan left a message for Kraft and Kraft called her the evening of January 25. It was Schwan who provided Kraft with the Discipline Documentation, Exhibit 10, which Kraft signed. *See* FOF # 6.

14. The evidence does not show, by the greater weight of the evidence, that Kraft was obviously or definitely under the influence of alcohol or any other specific, prohibited chemical substance while at work at Trinity on January 22, 1999. The evidence certainly shows some strange and unusual circumstances and a strange and unusual situation involving Kraft's condition and behavior at Centennial and later at the ER on January 22, 1999. One reading of the evidence is that there were observations made by several individuals, and there was some circumstantial evidence, so that when all the evidence is considered one may conclude that Kraft was under the influence of alcohol that day. On the other hand, the evidence does not prove that she was under the influence of alcohol. Certainly, testing would likely have proved or disproved it, but Kraft refused to do testing. But, without testing, the evidence does not show that Kraft was obviously or definitely impaired by alcohol on January 22, 1999; it shows she was possibly impaired. Actually, the ALJ believes in regard to the impairment of Kraft by alcohol that it is somewhere between possibly and likely to have occurred. Yet, the circumstantial evidence and the observations of several people are just not enough to come to the conclusion that Kraft was obviously or definitely impaired by alcohol or some other chemical substance. The Centennial doctors could not positively state that Kraft was under the influence of alcohol or some other chemical substance. That is why they ordered tests. The doctors were not certain whether Kraft could perform or function as a nurse on January 22, 1999, and they could not positively determine the extent of the impairment, nor could they positively identify the cause of the impairment. They believed that the situation regarding Kraft, based on their observations, presented the possibility of a clear and present danger to patients but it may have been possible that Kraft could have worked her shift without incident. Testimony of Dr. Allen. The doctors were not willing to put their trust in Kraft as a nurse, however. *Id.*

15. Trinity did not report the January 22, 1999, incident involving Kraft to the Board.

16. After the suspension, Kraft came back to work at Trinity. Trinity evaluated Kraft's job performance after the January 22, 1999, incident. Exhibit 11, Trinity Hospital Job Summary. The evaluation document indicates that Kraft meets the requirements of all of her primary job duties. Under "Personal Performance Improvement Plan" it is stated that "Bonnie's behavior at Convenient Care on 1-22-99 was discussed. Any further occurrence will be seriously handled." Kraft did not receive a pay increase after her evaluation because of the January 22 incident, but she was not further disciplined.

17. On April 3, 1998, Kraft was arrested and charged with the crime of simple assault for domestic violence. *See* Exhibit 12. The assault involved Kraft hitting and scratching a man at her home. Simple assault is punishable as a Class B Misdemeanor. N.D.C.C. § 12.1-17-01(1). *See* N.D.C.C. § 12.1-32-01(6). On April 6, she appeared in court and pleaded guilty to the charge. She spent three nights in the Ward County Jail facility and was fined \$150 as a result of the arrest. *See* Exhibit 12 and testimony of Detective Sgt. Murphy, Minot, Police Department.

18. Kraft was observed to be under the influence of alcohol at the time of her arrest for simple assault. Documents from the time of her arrest (Exhibits 12-14) also indicate that Kraft was taking several prescribed medications. Kraft admitted that she was prescribed these drugs at that time, but had not yet taken any on April 3, 1998, before her arrest. Kraft also acknowledged that she is still taking the prescribed drugs, and she acknowledged that these drugs affect the central nervous system.

19. Kraft testified that she is a diagnosed alcoholic and that she was admitted to the Heartview alcohol treatment center in Mandan, North Dakota for inpatient alcohol treatment in the early 1990s. Kraft further admitted that she still consumes alcohol though she claims it is infrequent. Kraft admitted to drinking two-three small glasses of wine on the day of her arrest for simple assault on April 3, 1998.

20. Kraft acknowledged that she has been diagnosed with depression and takes medication to help control her depression. Kraft acknowledged that taking her prescribed medications for depression may affect her central nervous system. But, Kraft denied that she had taken any of these prescribed medications, yet, on January 22, 1999. Kraft said that she mostly takes these prescribed medications for sleep.

21. Although a district court in North Dakota issued a Temporary Restraining Order (“TRO”) against Kraft in December 1996, for disorderly conduct, restraining her from any contact with the petitioner James Bland, the TRO was subsequently terminated and dissolved by the court, and the petition of James Bland was dismissed by the court. *See* Answer and attachments to answer. James Bland is the father of Jamie Bland, a witness against Kraft in the hearing on this Complaint.

22. The evidence shows, by the greater weight of the evidence, that the allegations of the Complaint, that Kraft “engaged in threatening, insulting and verbally abusive conduct to a 16-year old son of a Minot, N.D. physician . . .” (Complaint at 2) are insertion of sometimes serious disputes and difficulties between and in the private lives of two families into an administrative proceeding where they do not belong. Moreover, the proof is inconclusive about whether Kraft actually engaged in “threatening, insulting, and verbally abusive conduct” to the minor son of a North Dakota physician which were inconsistent with the standards of nursing practice. James Bland is described in the Complaint as “a Minot, N.D. physician.” However, James Bland’s license to practice medicine in North Dakota was permanently suspended by the North Dakota Board of Medical Examiners on September 5, 1996. *See* September 5, 1996, final Order of the North Dakota Board of Medical Examiners. This is apparently the same James Bland who filed a petition for a TRO against Kraft in 1996, which petition was ultimately dismissed. *See* two Memorandum Decisions, each including Order and Notice, of District Judge Glenn Dill, each dated January 2, 1997, Exhibit 1 and Answer. His son, Jamie Bland, testified at the hearing. He testified about an incident during which Kraft drove up to the Bland residence, as he was about to wash a car in the driveway, “squealing around the corner,” honking the horn and, then, shouting profanities. Testimony of Jamie Bland. Kraft’s statements are alleged to have insulted Jamie and his mother, and to have threatened his mother. Jamie testified that Kraft called his mother a “bitch” and then further said to him to “[t]ell my bitch of a mother to come to the house so she can fight her.” *Id.* He later testified upon cross-examination that “bitch” was the only profanity that Kraft used. *Id.* This incident did not happen on January 22, 1999, as stated in the Board’s January 10 closing brief (*see* the Board’s January 26 brief). It happened on September 22, 1999. Kraft does not deny that she drove up to the Bland house and talked to Jamie Bland, but she denies using profanity and

she denies engaging in threatening, insulting, and verbally abusive conduct. *See* Answer and Kraft's testimony. Interestingly, Kraft was not asked many questions about this incident at the hearing. Amanda ("Mandy Kraft"), a sixth grader, was with her mother on that occasion (Jamie Bland also acknowledged that she was in the car), and she testified that her mother did not use any profanity but did drive up to the Bland house and talk to Jamie Bland. Testimony of Mandy Kraft. She testified that Kraft said to Jamie Bland, "[y]our mother has been calling and making threats and I don't want her to call me anymore. She can come and face me at my house." *Id.* Certainly, the evidence shows a continuing, difficult dispute, another incident in a series of incidents that occurred between the Blands and Kraft, and Amanda Kraft's father, Kent Johnson. But, this incident, and the series of incidents, do not rise to the level of something that the Board should be concerned about. It is, essentially, a private matter, that, if really serious, requires action by the courts. Action was taken by the courts, and then dismissed, in regard to the earlier incident (the TRO). If the courts had taken up the matter and found against Kraft with regard to the disorderly conduct (TRO) incident or this latest incident involving the Blands, then the Board should be concerned. Again, there is inconclusive evidence about what really occurred at the Bland house on September 22, 1999. Moreover, the Board knows little about the background of these two families' dispute, *e.g.*, the cause, other incidents, if any, any attempts to resolve it, *etc.*

CONCLUSIONS OF LAW

1. Kraft has at all times during the allegations of the Complaint been, and remains, currently, licensed by the Board as a RN under the provisions of N.D.C.C. ch. 43-12.1. She is currently practicing as an RN in Minot, North Dakota.

2. Under N.D.C.C. § 43-12.1-14, the Board may take disciplinary action against a RN, to suspend, revoke, place on probation, or refuse to issue or renew a license, or to reprimand a licensee on the following grounds:

1. Has been arrested, charged, or convicted by a court, or has entered a plea of nolo contendere to a crime in any jurisdiction that relates adversely to the practice of

nursing and the licensee . . . has not demonstrated sufficient rehabilitation under section 12.1-33-02.1;

3. Has engaged in any practice inconsistent with the standards of nursing practice;

5. Is unfit or incompetent to practice nursing by reason of negligence, patterns of behavior, or other causes as established under rules adopted by the board;

N.D.C.C. § 43-12.1-14(1), (3), (5). (Emphasis supplied.)

3. N.D. Admin. Code ch. 54-02-07 provides the administrative rules for disciplinary actions against nurses. N. D. Admin. Code § 54-02-07-01.1 states, in part, as follows:

54-02-07-01.1. Nursing practice – Grounds for discipline. Practice inconsistent with acceptable standards of nursing practice by a licensee or registrant means behavior that may place a client or other person at risk for harm. Inconsistent practice includes incompetence by reason of negligence, patterns of behavior indicating the individual is unfit to practice nursing, as well as any of the following:

5. Practice of nursing without sufficient knowledge, skills, or nursing judgment.
6. Performance of nursing interventions in a manner inconsistent with acceptable nursing standards.

N.D. Admin. Code § 54-02-07-01.1(5), (6).⁴

4. N.D. Admin. Code § 54-02-07-02 defines “major incident” and “minor incident.”
“‘Major incident’ means an act or omission in violation of chapter 43-12.1 or these rules which indicates a licensee’s . . . continuing to practice poses a risk of harm to the client or another person.”
N.D. Admin. Code § 54-02-07-02(4). “‘Minor incident’ means an act or omission in violation of

⁴ N.D. Admin. Code § 54-02-07-01.1(6) formerly read “[p]erformance of nursing tasks or functions in a manner inconsistent with acceptable nursing standards.” N.D. Admin. Code § 54-02-07-01.1(5) effective from July 1, 1996, through February 2, 1998.

chapter 43-12.1 or these rules which indicates a licensee's . . . continuing to practice does not pose a risk of harm to the client or another person." N.D. Admin. Code § 54-02-07-02(5).

5. N.D. Admin. Code § 54-02-07-03.1 states that the reporting of violations of "incidents that may be violations of North Dakota statutes or grounds for disciplinary action by the board . . . should" be reported by "licensees, registrants, or citizens" according to whether the violation is a minor or major incident. If a violation is a minor incident, it may be handled in the "practice setting with a corrective action process if certain factors exist. N.D. Admin. Code § 54-02-07-03.1(1). (Emphasis supplied.) If a violation is a major incident, "the licensee or registrant must contact the board office." N.D. Admin. Code § 54-02-07-03.1(2). (Emphasis supplied.)

6. The evidence shows, by the greater weight of the evidence, that the request by Trinity to test Kraft for possible influence of alcohol or other chemical substance was not accomplished within and according to Trinity's own policies and procedures as contained in the Trinity Medical Center Personnel Policies & Procedures Department Managers Guide and the Employee Handbook, "Substance Abuse – Rehabilitation" policy. Therefore, although it may have been poor overall judgment on Kraft's part for her to have refused a test that may have exonerated her in regard to the observations made regarding her activities and behavior on January 22, 1999, it was not poor judgment specifically as to the mechanics of testing at Trinity. Although Kraft likely had only vague notions about the unfairness of the procedures employed by Trinity in getting her to take the tests, even after consulting with her attorney (there was no evidence that at that time either knew the specifics of Trinity's policies and procedures), she did base her refusal to take tests on basic notions of unfairness and the advice of her attorney. Her vague notions and the advice of her attorney, the evidence shows, have been proven right. Trinity did not follow its own policies and procedures. Therefore, specifically, as to her refusal to take tests in the manner presented by Trinity on January 22, 1999, *i.e.*, as requested by a Trinity doctor and a Trinity supervisory nurse, Kraft has been proven justified, at least to some extent. However, again, overall, Kraft used poor judgment in leaving the ER before the supervisory nurse came back to further pursue the matter of tests. Perhaps, Trinity would have gotten the matter straight before Kraft was tested, *i.e.*, the correct people would have been involved and Kraft tested in accordance with Trinity policy and

procedure. A nurse supervisor was involved with Kraft at that point in the ER, but Kraft chose to leave rather than wait for her return.

7. Nevertheless, Kraft did sign the “Discipline Documentation” with Trinity essentially agreeing to her suspension by Trinity and saying “I am aware that my actions were the cause for my suspension.” Exhibit 10. By signing this document she was, essentially, acknowledging that Trinity’s discipline of her (suspension) for her actions on January 22, 1999, was appropriate. However, in signing the document she did not admit to violation of any Trinity policy. She did not admit to being under the influence of alcohol or other prohibited substance on January 22, 1999, or otherwise. Thus, it seems, in reality, that Trinity handled the incident as a minor incident. Trinity, apparently, believed that the practice setting was the proper to handle the incident, employing certain corrective action.

8. The evidence does not show that Kraft unreasonably refused a proper request by her employer to submit to a chemical and medical screening and evaluation, including blood and urine tests, in violation of N.D.C.C. § 43-12.1-14(3) or (5), or in violation of N.D. Admin. Code § 54-02-07-01.1(5) or (6). From the evidence one cannot conclude that if Trinity had properly presented a testing scenario to Kraft, she would still have refused to test.

9. The evidence does show that Kraft was suspended from her employment at Trinity as a result of her actions on January 22, 1999, but it does not show, because of such suspension alone, that Kraft was in violation of the provisions of N.D.C.C. § 43-12.1-14(3) or (5), or in violation of N.D. Admin. Code § 54-02-07-01.1(5) or (6).

10. The evidence does not show that Kraft was definitely under the influence of alcohol or another specific, prohibited chemical substance on January 22, 1999, in violation of N.D.C.C. § 43-12.1-14(3) or (5), or in violation of N.D. Admin. Code § 54-02-07-01.1(5) or (6).

11. The evidence does not show that by having a TRO issued against her for disorderly conduct in 1996, that Kraft was in violation of the provisions of N.D.C.C. § 43-12.1-14(3) or (5), or in violation of the provisions of N.D. Admin. Code § 54-02-07-01.1(5) or (6).

12. The evidence does not show that Kraft engaged in threatening, insulting, and verbally abusive conduct to a 16-year old son of a Minot, North Dakota physician which was inconsistent with

the standards of nursing practice as violations of the provisions of N.D.C.C. § 43-12.1-14(3) or (5), or as violations of the provisions of N. D. Admin. Code § 54-02-07-01.1(5) or (6).

13. The evidence does show that Kraft has been arrested, charged, or convicted by a district court in North Dakota of a crime that relates adversely to the practice of nursing and that Kraft has not demonstrated sufficient rehabilitation under N.D.C.C. § 12.1-33-02.1. This is a violation of N.D.C.C. § 43-12.1-14(1). Although the crime of which Kraft was convicted was simple assault for domestic violence, a class B misdemeanor, it is a crime of violence of willfulness in causing bodily injury to another human being. *See* N.D.C.C. § 12.1-17-01(1). Commission of such a violent crime is opposite to the standards of the practice of nursing. Kraft's conviction for the simple assault occurred on April 6, 1998. Five years have not passed since the conviction so there is no presumption of rehabilitation. *See* N.D.C.C. 12.1-33-02.1(2)(c). Kraft did not present any evidence of rehabilitation, nor does any evidence presented at the hearing tend to show that Kraft has been sufficiently rehabilitated from commission of the crime. However, some of the nature of the offense, that fact that it was assault regarding domestic violence in her own home against a man in her own home and the fact that Kraft was intoxicated at the time, even though it is a crime that relates adversely to the practice of nursing, mitigates in the consideration. Kraft should not be subject to the severe disciplinary action by the Board for commission of such a crime, alone.

RECOMMENDED ORDER

The greater weight of the evidence shows that Kraft violated the provisions of N.D.C.C. § 43-12.1-14(1). Counsel for the Board recommends a one-year suspension of Kraft's RN license for violations of N.D.C.C. § 43-12.1-14(1), (3), and (5), as well as 54-02-07-01.1(5) and (6), arguing that all of the allegations of the Complaint are proven. However, all of the allegations of the Complaint are not proven. Only one allegation is proven. The remaining allegations either should not have been included in the Complaint (and are not proven) or have not been proven to be violations of law as indicated in the Complaint. Therefore, the ALJ recommends that the Board ORDER that Kraft's North Dakota RN license, license registration R23493 be SUSPENDED for a period of one year, but that

none of the suspension be currently invoked, provided Kraft not be found in violation of any of the provisions of N.D.C.C. § 43-12.1-14 or N.D. Admin. Code ch. 54-07-02 within one year from the issuance by the Board of its final order in this matter. If within one year of the Board's issuance of its order in this matter, Kraft is found in further violation of N.D.C.C. § 43-12.-14 or N.D. Admin. Code ch. 54-07-02, the uninvoked one year suspension of the Board's final order in this matter shall be invoked along with any penalty imposed as a result of such further violation.

Counsel for the Board also recommended imposition of a civil penalty of \$1000, plus costs and disbursements against Kraft as a result of this administrative action. N.D.C.C. § 43-12.1-13 allows the Board to impose “[f]ees of up to one thousand dollars or the assessment of costs and disbursements, or both” against Kraft “in addition to any licensure . . . sanctions.” Under the circumstances of this matter, imposition of such a large civil penalty and an award of costs and disbursements does not seem appropriate. However, the ALJ does not have enough information about the amount of civil penalty imposed by the Board in other administrative actions to be able to recommend the imposition of an amount of civil penalty. That is a matter completely within the discretion of the Board. Therefore, the ALJ will make no recommendation in regard to the amount of civil penalty for this administrative action, though the Board certainly has the discretion to impose it, though it may not have cause for imposing anything other than a much lighter civil penalty in this matter.

Dated at Bismarck, North Dakota, this 7th day of February, 2000.

State of North Dakota
Board of Nursing

By: _____
Allen C. Hoberg
Administrative Law Judge
Office of Administrative Hearings
1707 North 9th Street - Lower Level
Bismarck, North Dakota 58501-1882
Telephone: (701) 328-3260